UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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| MADHVAMUNI K. DAS, et al.,<br><br>Plaintiff,<br><br>v.<br><br>WMC MORTGAGE CORP., et al.,<br><br>Defendants. | Case No. C10-0650 PVT<br><br>**ORDER GRANTING IN PART AND DENYING IN PART CENTRAL MORTGAGE COMPANY'S AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED MOTION TO EXPUNGE NOTICE OF PENDENCY OF ACTION** |

Presently pending before the court is the motion to dismiss brought by Defendants Central Mortgage Company ("Central") and Mortgage Electronic Registration Systems, Inc. ("MERS"). Based on all the briefs and arguments presented,

IT IS HEREBY ORDERED that these Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART, with leave for Plaintiffs to file an amended complaint as discussed herein. Plaintiffs shall file the amended complaint within 30 days after entry of this order. Defendants shall have 30 days after Plaintiffs file their amended complaint to file their response.

IT IS FURTHER ORDERED that the motion to expunge the notice of pendency of action is GRANTED.

## I. INTRODUCTION

Plaintiffs allege they are immigrants, minorities, and reside at 5978 Allen Ave, San Jose, California ("the Subject Property"). They further allege that in 2006 Defendants induced them to take out a home loan in the amount of $945,000 (the "Loan"). They claim Defendants knew they had limited income and did not qualify for the Loan. They filed a complaint on February, 16, 2010 in which they asserted numerous causes of action arising from events connected with the Loan and the subsequent commencement of foreclosure proceedings. Defendants Central and MERS moved to dismiss for failure to state a claim. Plaintiffs filed a First Amended Complaint ("FAC") and then an opposition to the motion to dismiss in which they argued that the motion was mooted by the FAC. Defendants Central and MERS responded by filing the present motion to dismiss the FAC.[1] In their new motion, Defendants Central and MERS argue that Plaintiffs' FAC should be dismissed because it fails to state plausible claims against them. In their opposition, Plaintiffs concede that First through Tenth and Fifteenth through Nineteenth are not asserted against Defendants Central and MERS. And Defendants' motion does not address the Twenty-First cause of action. Thus, the only causes of action at issue for the purposes of this motion are the Eleventh through Fourteenth, the Twentieth, Twenty-Second and Twenty-Third.

## II. LEGAL STANDARDS

### A. DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. Dismissal is warranted where the complaint lacks a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see also Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law").

A complaint may also be dismissed where it presents a cognizable legal theory, but fails to plead facts essential to the statement of a claim under that theory. *Robertson*, 749 F.2d at 534. The

[1] The prior motion to dismiss filed by Central and MERS is deemed withdrawn.

Supreme Court has held that, while a complaint does not need detailed factual allegations:

> "[a] plaintiff's obligation to provide 'grounds' of his 'entitle(ment) to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ."

*See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007), quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

On a Rule 12(b)(6) motion, all facts are assumed to be true and construed in the light most favorable to the nonmoving party. *See Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003).

### B. LEAVE TO AMEND

Leave to amend must "be freely given when justice so requires." *See* FED.R.CIV.P. 15(a). This policy is applied with "extraordinary liberality." *See Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir. 1990). "[L]eave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *See Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 607 (9th Cir. 1992). "[T]here exists a presumption under Rule 15(a) in favor of granting leave to amend." *See Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003). However, leave to amend need not be granted when amendment would be futile. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

## III. DISCUSSION

### A. DISMISSAL IS NOT WARRANTED AS TO PLAINTIFFS' ELEVENTH CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA CIVIL CODE SECTION 2923.5.

In the FAC, Plaintiffs allege that the Defendants violated California Civil Code section 2923.5 because they did not contact the borrower, and because the notice of default did not include a required declaration. Defendants argue that this cause of action fails because (1) the Notice of Default did include the required declaration that Central contacted the borrower to discuss the borrower's financial situation, (2) Plaintiffs did not explain how they were prejudiced by the alleged failure to contact them, (3) California Civil Code section 2923.5 does not afford a private right of action, and (4) Plaintiffs have not tendered the amount of the secured indebtedness.

Section 2923.5 provides: "a mortgagee, trustee, beneficiary or authorized agent may not file a notice of default [...] until 30 days after initial contact is made [...] or 30 days after satisfying the due diligence requirements." CAL. CIV. CODE § 2923.5(a)(1). The contact is required in order "to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." CAL. CIV. CODE § 2923.5(a)(2). Further, a notice of default must be accompanied by a declaration specifying that the "mortgagee, beneficiary or authorized agent has contacted the borrower or has tried with due diligence to contact the borrower." CAL. CIV. CODE § 2923.5(b).

The parties dispute whether or not the Defendants contacted the Plaintiffs at least 30 days prior to the filing of the Notice of Default. The Defendants rely on a declaration by Defendant Central which was attached to the Notice of Default that was recorded, for which the Defendants have requested judicial notice. Because the declaration does not contain information that is generally known, Defendants' grounds for their request for judicial notice must be predicated on the declaration being a source "whose accuracy cannot reasonably be questioned." FED. R. EVID. § 201(b)(2). The court may take judicial notice of the fact that the declaration signed by Natalie McClendon on April 18, 2009 was recorded. However, the court may not take notice of the content of the declaration because Defendants have not shown that Ms. McClendon is a source "whose accuracy cannot reasonably be questioned." *See e.g., Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858 n. 3 (9th Cir. 2008); and *Turnacliff v. Westly*, 546 F.3d 1113, 1120 n. 5 (9th Cir. 2008). The fact that the declaration was recorded is not indisputable proof that Defendants actually contacted Plaintiffs to discuss their financial situation and the impending foreclosure. Further, courts may not take notice of any matter that is in dispute. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Walker v. Woodford*, 454 F.Supp.2d 1007, 1022 (S.D.Cal. 2006).

Defendants argue that Plaintiffs' claim under Section 2923.5 fails because Plaintiffs have not alleged that they suffered prejudice as a result of Defendants' failure to contact them, citing *Pantoja v. Countrywide*, 640 F.Supp.2d 1177, 1186 (N.D.Cal. 2009). However, *Pantoja* does not support Defendants' position. In *Pantoja*, the plaintiff did not challenge the Defendants' assertion that they had contacted the plaintiff as required by section 2923.5(b). *Id.* Rather, the plaintiff only alleged that Defendants did not attach to the notice "a declaration based on personal knowledge discussing

or detailing their efforts to avoid foreclosure." *Id.* The court explained that in order to survive a motion to dismiss, "plaintiff would need to allege that this contact either did not occur or was deficient." *Id.* That is precisely what Plaintiffs allege here. Moreover, Plaintiffs specifically allege that as a result of Defendants' violation of section 2923.5, they "have suffered, and continue to suffer, damages including, without limitation, monetary damages and emotional distress." *See* FAC ¶ 130.

Defendants also contend that section 2923.5 does not afford a private right of action. There is not a consensus among the courts who have considered this issue. *Cf. Gaitan v. Mortgage Electronic Registration Systems*, No. EDCV 09-1009, 2009 WL 3244729, at *7 (C.D.Cal. 2009) (finding no private right of action) with *Mabry v. Superior Court*, 185 Cal.App.4th 208, 217 (2010) ("in order to have its obvious goal of forcing parties to communicate (the statutory words are 'assess' and 'explore') about a borrower's situation and the options to avoid foreclosure, section 2923.5 necessarily confers an individual right"). The court finds the California appellate court's reasoning in *Mabry* regarding this California law persuasive. *See also, Ortiz v. Accredited Home Lenders*, 639 F.Supp.2d 1159, 1166 (S.D.Cal. 2009) (agreeing that "California legislature would not have enacted this "urgency" legislation, intended to curb high foreclosure rates in the state, without any accompanying enforcement mechanism").

Defendants further argue that this cause of action should be dismissed because Plaintiffs have not alleged tender of the amount of the secured indebtedness. However, the rationale underlying the tender rule does not apply in this case. As one California appellate court has explained, "the rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs." *See FPCI RE-HAB 01 v. E & G Investments*, 207 Cal.App.3d 1018, 1022 (1989). Essentially, requiring tender of the amount of the secured indebtedness was proper because otherwise invalidating the foreclosure sale would be a useless act. *See Id.* at 1021.

Unlike the situation in *E&G Investments*, voiding a foreclosure for violation of Section 2923.5 is not inherently a useless act absent tender. The whole purpose of this section is to allow a homeowner an opportunity to at least discuss with the lender the possibility of loan modification.

Where such communication does result in loan modification, the homeowner can avoid foreclosure even if he or she would not otherwise be in a position to fully "redeem" the property at a foreclosure sale. In situations like this, a requirement that the homeowner tender the entire amount of the secured indebtedness would actually defeat the purpose of the statute.

Based on the foregoing, Defendants have not shown that dismissal is warranted as to this cause of action.

### B. DISMISSAL IS WARRANTED AS TO PLAINTIFFS' TWELFTH CAUSE OF ACTION TO QUIET TITLE AGAINST DEFENDANTS CENTRAL AND MERS

Defendants argue that the cause of action for quiet title fails because Plaintiffs have not alleged defendant MERS claims an interest in the Subject Property. They further contend that this cause of action fails as asserted against Central because it lacks necessary elements and because a mortgagor cannot quiet title against the mortgagee without paying the secured debt . Plaintiffs do not dispute these assertions and simply request leave to amend if the court finds any defects in this cause of action.

The Plaintiffs have not alleged that MERS has, and MERS does not claim to have, an interest in the Subject Property. To the contrary, the FAC alleges that "MERS assigned, granted and transferred to Old Republic all beneficial interest under [...] the deed of trust." FAC ¶ 36. Defendant MERS confirms it has no present interest in the Subject Property. To properly assert cause of action for quiet title, a complaint must include "the adverse claims to the title of the plaintiff." *See* CAL. CODE CIV. PROC. § 761.020(c). The plaintiff must describe the adverse claims with specificity. *See* CAL. CODE CIV. PROC. § 761.020(c) notes; *see also, Ortiz v. Accredited Home Lender*, 639 F.Supp.2d 1159, 1168 (S.D.Cal. 2009). Thus, this cause of action fails against Defendant MERS.

The cause of action also fails as asserted against defendant Central because the FAC is not verified and does not contain a legal description of the property, the title of the plaintiff, the adverse claims to the title, or the date as to which determination is sought. *See*, CAL. CODE CIV. PRO. § 761.020. Thus, dismissal is warranted as to this cause of action against Central and MERS. Plaintiffs are granted leave to amend the complaint, if they can do so consistent with the requirements of Federal Rules of Civil Procedure 11.

### C. DISMISSAL IS WARRANTED AS TO PLAINTIFFS' THIRTEENTH CAUSE OF ACTION FOR VIOLATION OF RICO AGAINST CENTRAL AND MERS

Defendants argue that the cause of action for the violation of RICO fails because the FAC does not plead facts with sufficient particularity. In response, Plaintiffs point out that the RICO claim in the FAC "provides a list of [ten] specific predicate acts, three of which directly relate to Defendants' conduct."

To state a civil RICO claim, Plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to Plaintiffs' "business property or property." *See Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001). Plaintiffs allege that Defendants violated the RICO statute which provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *See,* 18 U.S.C. § 1962(c). A "pattern of racketeering activity" means "at least two acts of racketeering activity." *See* 18 U.S.C. § 1961(5). "Racketeering activity" can be any act which is indictable under a criminal offense listed in the statute. *See* 18 U.S.C. § 1961(1)(B).

Plaintiffs allege that "the predicate acts which constitute this pattern of racketeering activity were part of a scheme to wrongfully foreclose upon the Subject Property without legal right, and therefore acquire title to the Subject Property through deception and fraud." FAC ¶ 138. Essentially, Plaintiffs contend that Defendants engaged in mail and wire fraud: "for the purpose of executing this scheme to defraud Plaintiffs and obtain money by means of false pretenses, said Defendants also transmitted and received messages by wire, including but not limited to telephone and internet communications." FAC ¶ 140. Mail fraud as a predicate to a RICO claim is subject to the heightened pleading standard of Fed. R. Civ. Pro. 9(b) which requires that the circumstances constituting fraud be stated with particularity. *See Alan Neuman Productions v. Albright*, 862 F.2d 1388, 1392-1393 (9th Cir. 1988) ("the pleader must state the time, place, and specific content of the false misrepresentations as well as the identities of the parties to the misrepresentation.")

Plaintiffs have not stated the predicate acts with sufficient particularity. Plaintiffs contend

that Paragraph 138(h-j) of the FAC provides sufficient allegations. Plaintiffs have not indicated the "time, place and specific content" of the allegedly false representations made by Defendants to Plaintiffs or the type of communications used by Defendants. Plaintiffs simply alleged that Defendants communicated with Plaintiffs in order to defraud Plaintiffs. Plaintiffs also alleged that "[t]hese acts of racketeering occur[ed] within ten years of each other" but did not specify when those acts occurred. FAC ¶ 141. Dismissal of this claim against Central and MERS is warranted because Plaintiffs' allegations do not meet the heightened pleading standard required under Fed. R. Civ. Pro. 9(b). Plaintiffs are granted leave to amend the complaint, if they can do so consistent with the requirements of Federal Rules of Civil Procedure 11.

### D. DISMISSAL IS NOT WARRANTED AS TO PLAINTIFFS' FOURTEENTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendants argue that the cause of action for intentional infliction of emotional distress should be dismissed for two reasons: (1) emotional distress is not recoverable as an element of a fraud or breach of contract claim; and (2) the conduct of the beneficiary and trustee in foreclosing upon the Subject Property is privileged.

Defendants' first arguments fail because this is not a cause of action for either fraud or breach of contract. As such, the case authorities related to whether emotional distress damages may be recovered in connection with a cause of action for contract or fraud are inapposite.

The "privilege" Defendants assert for conduct in pursuit of their own economic interests does not shield them from liability they have acted in an outrageous manner and the elements of an action for intentional infliction of emotional distress are otherwise met. *See, e.g. Fletcher v. Western National Life Ins. Co.*,10 Cal.App.3d 376, 395-96 (1970) ("one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress"); *see also, Krause v. Bank of America*, 202 Cal.App.3d 38, 67 (1988) ("A party is not subject to liability for infliction of emotional distress when it has *merely* pursued its own economic interests and *properly* asserted its legal rights" (emphasis added)).

Based on the foregoing, Defendants have not shown that dismissal is warranted as to this cause of action.

### E. DISMISSAL IS NOT WARRANTED AS TO PLAINTIFFS' TWENTIETH CAUSE OF ACTION AGAINST DEFENDANTS CENTRAL AND MERS FOR NEGLIGENCE

Defendants argue that the cause of action for negligence fails because (1) it pertains solely to American Mortgage and CIT Group, (2) the allegation that Defendants breached a duty of reasonable care is conclusory, and (3) the cause of action is barred by the statute of limitations.

The FAC does not limit this cause of action to Broker and Lenders as suggested by Defendants. Rather, the FAC alleges that "[a]ll Defendants" owe a duty of reasonable care and that Defendants breached that duty by "subjecting the Plaintiffs to an unreasonable risk of harm." FAC ¶¶ 197, 198.

Defendants' second argument is likewise unpersuasive. Plaintiffs point out that the cause of action incorporates by reference the previously asserted allegations. Based on at least one of those allegations, Plaintiffs adequately alleged the breach of a duty of reasonable care. Specifically, Plaintiffs allege that Defendants "refused to pursue alternatives to foreclosure of the subject property with Plaintiffs." FAC ¶ 138(i).

Generally, a financial institution does not owe a duty of care to a borrower in connection with "ordinary role of a lender in a loan transaction." *See Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1096 (1991) (lender owed no duty of care to borrower in connection with appraisal which was done to protect *lender's* interests). However, the fact that lenders traditionally had no duty of care to borrows while acting to protect their own interests does not shield lenders from any duty of care to a borrower under all circumstances. For example, a lender may incur liability for negligence to the borrow "when the lender actively participates in the financed enterprise beyond the domain of the usual money lender." *Id.*

The court in Nymark explained that in order to determine whether a financial institution owes a duty of care to a borrower-client, the court must consider a number of factors including "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." *Id.* at 1098. It appears likely

that weighing those factors would support a finding of a duty of care under the present circumstances.[2] However, the court need not go through this exercise, because under the present circumstances a duty of care may be "borrowed" from California Civil Code section 2923.5. *See Elsner v. Uveges*, 34 Cal.4th 915, 927-928, fn. 8 (2004) ("Statutes may be borrowed in the negligence context . . . to establish a duty of care"); *see also* CAL. EVID. CODE § 669.

California Evidence Code section 669 provides that "negligence is presumed if the plaintiff established four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence [] the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons whose protection the statute, ordinance or regulation was adopted." *Das v. Bank of America*, 186 Cal.App.4th 727, 738 (Jun. 28, 2010). The first two elements are questions of fact, while the latter two elements are determined by the court as a matter of law. *See Galvez v. Frields*, 88 Cal.App.4th 1410, 1420 (2001). Here, taking the allegations of the complaint as true for purposes of this motion to dismiss, Defendants failure to contact Plaintiffs and failure to explore options to avoid foreclosure violated the mandate of Section 2923.5, Plaintiffs were thereby injured because they lost their home to foreclosure without any opportunity to explore alternatives with the lender, that injury is exactly the kind of occurrence Section 2923.5 was designed to prevent, and Plaintiffs are among the class of persons for whose protection Section 2923.5 was enacted. Thus, Plaintiffs have adequately alleged a cause of action for negligence against these Defendants.

This claim is not barred by the statute of limitations. In California the statute of limitations for negligence is two years. *See* CAL. CODE CIV. PROC. § 335.1. The acts alleged in Paragraph 138(i) of the FAC occurred in 2009, less than 2 years before this lawsuit was filed.

Based on the foregoing, Defendants have not shown that dismissal is warranted as to this cause of action.

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[2] The court does not at this time ascribe moral blame to the acts alleged in the FAC. Regardless of the presence or lack of moral blame, the remaining factors would appear to weigh decidedly in favor of finding a duty of care.

### F. DISMISSAL IS WARRANTED AS TO PLAINTIFFS' TWENTY-SECOND CAUSE OF ACTION FOR WRONGFUL FORECLOSURE FAILS TO STATE A CAUSE OF ACTION

Plaintiffs base their cause of action for wrongful foreclosure on Defendants' lack of possession of the original promissory note, failure to identify the holder of the beneficial interest in the Notice of Trustee's Sale, and failure to comply with California Civil Code section 2923.5.

Plaintiffs' first argument is unpersuasive. In California, there is no requirement to produce an original promissory note prior to the initiation of a nonjudicial foreclosure. *See Pantoja v. Countrywide Home Loans*, 640 F.Supp.2d 1177, 1186 (N.D.Cal. 2009). And Defendants' failure to identify the beneficiary as required under California Civil Code section 2924c(b)(1) is not sufficient to invalidate the sale where no prejudice was suffered by the plaintiff. *Id.*

Finally, while Plaintiffs allege they have sustained injury as a result of Defendants' alleged failure to comply with California Civil Code section 2923.5, that allegation appears to be insufficient to constitute wrongful foreclosure. "An action for the tort of wrongful foreclosure will lie [only] if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *See Roque v. Suntrust Mortg., Inc*, 2010 WL 546896 (N.D.Cal. Feb. 10, 2010), quoting *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610, 623 (Nev. 1983).

Because Plaintiffs fail to allege that no breach of condition or failure of performance existed on their part at the time of the foreclosure sale, dismissal is warranted as to this cause of action. Plaintiffs are granted leave to amend if they can do so consistent with the requirements of Federal Rules of Civil Procedure 11.

### G. DISMISSAL IS WARRANTED AS TO PLAINTIFFS' TWENTY-THIRD CAUSE OF ACTION FOR AN ACCOUNTING FAILS TO STATE A CAUSE OF ACTION

Defendants argue that this cause of action fails because (1) the FAC contains no viable claims for relief, (2) Plaintiffs' have not alleged sufficient facts to support a fiduciary duty between themselves and Defendants, (3) Plaintiffs' substantive claims provide adequate remedies at law.

Defendants' second and third arguments are dispositive. An accounting may be sought "where a fiduciary relationship exists between the parties" or "where ... the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *See* 5 Witkin, Cal. Proc. 5th (2008) Pleading, § 819. "A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law." *See St. James Church of Christ Holiness v.Super. Ct. of L.A. County*, 135 Cal.App.2d 352, 359 (1955).

In the present case, Plaintiffs have not alleged sufficient facts to support a fiduciary duty. Therefore, any cause of action for an accounting must plausibly allege that the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. Plaintiffs have not done so. Plaintiffs conclusory assertion that a balance is due that can "only be ascertained by an accounting" is insufficient to "raise a right to relief above the speculative level." *See Twombly,* 550 U.S. at 555. Moreover, Plaintiffs have not alleged that they have no adequate remedy at law. Thus, dismissal is warranted as to this cause of action.

Plaintiffs are granted leave to amend the complaint, if they can do so consistent with the requirements of Federal Rules of Civil Procedure 11.

### H. AN ORDER EXPUNGING THE NOTICE OF PENDENCY OF ACTION IS REQUIRED BECAUSE PLAINTIFFS HAVE NOT ESTABLISHED THE PROBABLE VALIDITY OF THE REAL PROPERTY CLAIM BY A PREPONDERANCE OF THE EVIDENCE

Plaintiffs argue that the Notice of Pendency of Action should not be expunged because the complaint indicates probable validity of a judgment against Defendants, and because Defendants must file a motion to expunge the Notice of Pendency of Action. Neither argument defeats Defendants' motion as to the Notice of Pendency of Action.

Addressing the second argument first, the court notes that the instant motion *is* a motion to expunge the Notice of Pendency of Action.

As to Plaintiffs' showing of probable validity, Plaintiffs reliance on their unverified complaint is insufficient. California Code of Civil Procedure 405.32 provides:

> In proceedings under this chapter, the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim. The court shall not order an undertaking to be given as a condition of expunging the notice if the court finds the claimant has not established the probable validity of the real property claim.

Because Section 405.32 requires a claimant to establish the probable validity of a real property claim "by a preponderance of the evidence," the burden cannot be met by an unverified complaint. *See, Burger v. Superior Court*, 151 Cal.App.3d 1013, 1019 (1984) (noting that even under a definition of evidence that includes verified documents of various kinds, an unverified complaint is not sufficient evidence to defeat a motion to expunge a lis pendens). Because Plaintiffs have not submitted *any* evidence in support of their real property claim, Section 505.32 mandates that the court grant the motion to expunge the Notice of Pendency of Action.

## IV. CONCLUSION

For the reasons discussed herein, dismissal of the Twelfth, Thirteenth, Twenty-Second and Twenty-Third causes of action in the FAC is warranted as to Central and MERS. Plaintiff is granted leave to amend. In all other respects, dismissal of the FAC is not warranted as to Defendants Central and MERS.

An order expunging the Notice of Pendency of Action is warranted because Plaintiffs failed to submit any actual evidence in support of their real property claims.

Dated: *10/28/10*

Patricia V. Trumbull
PATRICIA V. TRUMBULL
United States Magistrate Judge